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DEPARTMENT OF EDUCATION

34 CFR Parts 600, 602, 603, 668, 682, 685, 686, 690, and 691

[Docket ID ED-2010-OPE-0004]

RIN 1840-AD02

Program Integrity Issues

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final regulations; clarification and additional information.

SUMMARY: On October 29, 2010, the Department of Education published in the Federal Register final regulations for improving integrity in the programs authorized under title IV of the Higher Education Act of 1965, as amended (HEA) (October 29, 2010, final regulations). The preamble to those regulations was revised in a Federal Register notice of March 22, 2013. This document clarifies and provides additional information about the October 29, 2010, final regulations.

DATES: This clarification and additional information apply to the October 29, 2010, regulations (75 FR 66832), which were generally effective July 1, 2011.

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SUPPLEMENTARY INFORMATION:

The October 29, 2010, final regulations (75 FR 66832) amended the regulations for Institutional Eligibility Under the HEA, the Secretary's Recognition of Accrediting Agencies, the Secretary's Recognition Procedures for State Agencies, the Student Assistance General Provisions, the Federal Family Education Loan (FFEL) Program, the William D. Ford Federal Direct Loan Program, the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program, the Federal Pell Grant Program, and the Academic Competitiveness Grant (AGC) and the National Science and Mathematics Access to Retain Talent Grant (National Smart Grant) Programs. On March 22, 2013 (78 FR 17598), the

Department revised the preamble discussion to the October 29, 2010, final regulations in response to the remand in Ass'n of Private Sector Colls. & Univs. (APSCU) v. Duncan, 681 F.3d 427 (D.C. Cir. 2012) (78 FR 17598). This document clarifies and provides additional information about the October 29, 2010, final regulations in accordance with a subsequent district court order in APSCU v. Duncan, 70 F. Supp. 3d 446 (D.D.C. 2014).

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#### Clarification and Additional Information

Graduation-Based and Completion-Based Compensation. In APSCU v. Duncan, 70 F. Supp. 3d 446 (D.D.C. 2014), the district court determined that the Department had not adequately explained or supported its decision to ban compensation to an educational institution's recruiters of students based on the students' graduation from or completion of educational programs offered by the institution. The regulations at 34 CFR §668.14(b)(22), implementing the statutory ban on enrollment-based compensation to recruiters of students, 20 U.S.C. 1094(a)(20), do not contain a ban on graduation-based or completion-based compensation. Although the Department removed the safe harbor that permitted certain graduation-based or completion-based compensation and previously indicated that it interpreted the amended regulations to ban such compensation, see, e.g., 75 FR 66874, the Department hereby indicates, in response to the district court's decision, that the Department has reconsidered its interpretation and does not interpret the regulations to proscribe compensation for recruiters that is based upon

students' graduation from, or completion of, educational programs. Correspondingly, the Department will not view the references in the regulations to recruiter enrollment activities that may occur "through completion" by a student of an educational program, 34 CFR 668.14(b)(22)(iii)(B)(introduction), and (iii)(B)(2)(ii), as prohibiting graduation-based or completion-based compensation to recruiters.

The Department has changed its interpretation because, at this time, it lacks sufficient evidence to demonstrate that schools are using graduation-based or completion-based compensation as a proxy for enrollment-based compensation. In assessing the legality of a compensation structure, the Department will focus on the substance of the structure rather than on the label given the structure by an institution. Thus, although compensation based on students' graduation from, or completion of, educational programs is not per se prohibited, the Department reserves the right to take enforcement action against institutions if compensation labeled by an institution as graduation-based or completion-based compensation is merely a guise for enrollment-based compensation, which is prohibited. Compensation that is based upon success in securing

enrollments, even if one or more other permissible factors are also considered, remains prohibited.

Impact on Minority Enrollment. The district court found that the Department failed to respond adequately to two commenters who questioned whether the amended regulations "might adversely affect minority outreach." Id. at 456; see also APSCU v. Duncan, 681 F.3d 427, 449 (D.C. Cir. 2012). The district court remanded the matter for the Department to address "the potential effect on minority recruitment, i.e., whether minority enrollment could decline under the new regulations." APSCU v. Duncan, 70 F. Supp. 3d at 456.

The particular comments were included in two submissions that also included comments on other aspects of the proposed regulations. The first commenter asked:

Can schools increase compensation to personnel involved in diversity outreach programs for successfully assembling a diverse student body? Does the Department intend to foreclose schools' ability to compensate their staffs for successfully managing outreach programs for students from disadvantaged backgrounds like the eight TRIO programs administered by the Department?

DeVry to Jessica Finkel (August 1, 2010), AR - 3386. The second commenter asked:

How will the new regulations apply to employees who are not involved in general student recruiting, but who are involved in recruiting certain types of

students? Examples would include college coaches who recruit student athletes, and employees in college diversity offices who recruit minority students. We see nothing in the proposed regulations that excludes these types of employees from the scope of the incentive compensation law. Thus, coaches who recruit student athletes would not be able to be compensated, in any part, on the number or caliber of students they recruited or the volume of university revenue generated by the teams on which the athletes played. Similarly, employees responsible for recruiting minority students would not be able to be compensated, in any part, on an increase in minority students who enroll at the college. We believe both of these practices are widespread and promote desirable goals, and are another example of how unclear, and potentially far-reaching, the Department's proposed regulations are. We request the Department's guidance on how to apply the law to compensation of these particular practices.

Career Education Corporation to Jessica Finkel (August 1, 2010) AR - 3308.

The ban on the payment of incentive compensation precludes institutions from paying their recruiters, or enrollment counsellors, bonuses based upon the number of students they enroll, irrespective of the student's minority or other status and irrespective of whether the goal of the recruiters is to increase diversity. The statute and accompanying regulations address the powerful incentive that such pay provides for the recruiter to close the sale - whether or not the training offered is really what the individual needs. The ban exists to shelter all students from abusive practices that have historically

occurred when recruiters were rewarded based on the number of students enrolled, as opposed to a more fulsome evaluation of a student's particular needs and an institution's capacity to meet those needs. Congress had no basis to expect (nor do we) that recruiters paid by incentive-based compensation who focus their recruitment efforts on minorities (or any other group, including athletes) would disregard their personal gain as they persuade individuals to enroll.

Minority student enrollment is not a goal in itself; minority student success matters, not just enrollment. Although the ban on incentive compensation may cause minority student enrollment numbers to decline, we expect that the minority students who do ultimately enroll will have a better chance at success, because they will have enrolled based on a decision made free of pressured sales tactics, and they presumably would be a good fit for the school they select. Indeed, as the Department has stated, "[m]inority and low income students are often the targeted audience of recruitment abuses, and our regulatory changes are intended to end that abuse. It is our expectation and objective that enrollment of students, including minority students, against their best educational interests would be



reduced with the elimination of improper incentive compensation.” 78 FR 17600 (2013).

In response to the district court’s remand and the commenters’ questions, the Department hereby acknowledges that the amended regulations could negatively affect outreach and enrollment generally, as well as student outreach that is specifically targeted at promoting diversity, which could result in fewer minority students recruited and enrolled. However, neither the statute nor any information presented by the commenters or in the administrative record provides a basis for treating a recruitment program directed at minority students differently than an institution’s general or other specific recruitment programs. And, as explained below, there are ample ways for schools to maintain or increase their enrollment of minority students (and other students) that are likely to achieve a positive result from their enrollment besides providing compensation based on recruiters’ enrollment numbers.

For several reasons, estimating how significant the effect on minority recruitment or enrollment may be is difficult. A robust assessment of the effect of incentive-based compensation on minority outreach and enrollment would require a comparison between schools with similar

characteristics, one group of which paid its recruiters with incentive-based compensation for minority enrollments, and the other group which did not. We have not conducted such an experiment, and we have found no such study or analysis of this issue in the literature.

Another way to estimate the effect of the incentive compensation ban on institutions' recruitment of minority students would be to estimate how schools that pay incentive compensation to staff who recruit minorities would change their practices as a result of the ban on enrollment-based incentive compensation. If recruiting minority students is more difficult than recruiting other students, we expect schools would need to take steps to achieve the same level of success achieved by paying recruiters compensation based on the number of minority students they enroll, and that this would include, among other things, hiring more recruiters or changing their salary schedules in order to attract more talented recruiters, or both. We believe that schools that devote special efforts to recruit minority students and that used incentive compensation payments to drive those efforts in the past devoted significant resources to those payments, though we have no data quantifying those costs. We would expect those schools to redirect those resources if they

wanted to ensure continued success in recruiting and enrolling minority students. Such steps could include increasing salaries to attract more capable recruiters or developing new or enhancing existing outreach activities. We expect that those for-profit schools that currently enroll substantial numbers and high percentages of minority students would take such steps.

Accepting for purposes of this analysis the assertion that efforts to recruit minority students are specialized and thus require more resources than ordinary recruiting efforts generally used, we consider it reasonable to expect that some schools may conclude that the cost of those resources outweighs the benefits of maintaining or increasing special recruiting efforts for minority students. The group of schools more likely to choose not to allocate the added resources needed for specialized minority recruiting would appear to be those schools which depend less on minority enrollments, specifically: for-profit schools that offer longer programs (2 year and 4 year programs), and public or non-profit institutions. Minority enrollment might decline at some institutions in this group, because institutions in this group, compared to those for-profit institutions offering shorter programs, appear to depend less on minority enrollment than for-

profit institutions offering shorter programs. They would be more likely to consider the expenses of increasing salaries or adding staff for specialized minority recruiting to outweigh the benefits of maintaining their minority recruiting efforts at the same level as before the ban. Nevertheless, the size of reductions in minority enrollments that would be fairly attributable to the ban - as opposed to other causes - remains difficult to predict.

Next, we would need to determine to what extent recruiters engaged under any revised schemes would be likely to succeed in recruiting minority students without the sales tactics that the ban is intended to deter. Last, for schools affected by the ban, we would need to distinguish those effects that are fairly attributed to the incentive compensation ban itself from those effects that could be attributed to other factors such as competitors' minority student recruitment efforts or a program's performance under the Department's gainful employment regulations, which apply to the same kinds of programs at for-profit schools that are being promoted by such recruiters. No data exists from which one can make these determinations.

While there is uncertainty about the size of any adverse effect of the ban on institutions' recruitment of

minority students, the evidence that is available does not support an assertion that the Department's rule will seriously undermine efforts to obtain educational diversity. In "For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success,"<sup>1</sup> the Senate HELP Committee referred to GAO's 2011 study of student outcomes at for-profit schools. In that study, GAO observed that African American and Hispanic students already comprised some 48 percent of all students enrolled in for-profit schools - more than the percent of students enrolled at for-profit schools who are non-Hispanic white (46 percent; Asian-Pacific Islanders and other non-Hispanic white students account for the other 6 percent of for-profit school students), double the percentage of students enrolled at private non-profit schools who are minority students, and far more than the percentage (28 percent) of students enrolled in public institutions who are minority students.<sup>2</sup> In addition, we note that the pattern observed in the GAO report continued in succeeding years, and was reflected at each credential

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<sup>1</sup>For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success, Senate HELP Committee, Majority Committee Staff Report, July 30, 2012, at 46, 47.

<sup>2</sup> Id.

level.<sup>3</sup> These data demonstrate that for-profit schools at each credential level already enroll disproportionately large percentages of minority students compared to non-minority students and therefore call into question one of the commenter's claims that minority recruitment efforts by the for-profit institutions to which the ban applies are needed to successfully assemble a diverse student body. (AR-3386, 3429, 3430). For-profit schools clearly already have diverse student bodies, dramatically different than student bodies at public or private non-profit institutions.

Although the data show that for-profit schools already enrolled a significant percentage of minority students, estimating whether this diversity has been the result of the payment of incentive compensation, and whether the incentive compensation ban will negatively affect this

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<sup>3</sup> Smith, Peter, & Parrish, Leslie (2014), Do Students of Color Profit from For-Profit College? Poor Outcomes and High Debt Hamper Attendees' Futures, Center for Responsible Lending, at 9, available at <http://higherednotdebt.org/tag/center-for-responsible-lending>. 2011 data show that of African Americans who enroll in schools that offer only short-term (non-degree) programs (less than 2-year), 91 percent do so at for-profit schools; of Hispanic students who enrolled in those schools, 85 percent enrolled at for-profit schools, but of white students in such programs, only 76 percent enrolled at for-profit schools. Of students who enroll at 2-year institutions, the pattern continues: 10 percent of African Americans and 8 percent of Hispanic students who enroll in 2-year institutions do so at for-profit schools, while only 5 percent of white students who enroll in 2-year schools do so at for-profit schools. Of African American and Hispanic students who enroll at 4-year institutions, 28 percent and 15 percent, respectively, enroll at for-profit schools, while only 10 percent of white students who enroll at 4-year institutions do so. Id. at 9.

already very diverse enrollment, would require a reliable estimate of the prevalence of incentive-based compensation in recruiting efforts directed at these minority students, as opposed to other students. The Department has no evidence to show what percentage of these minority students were enrolled on account of incentive-based compensation, as opposed to other features of for-profit schools.<sup>4</sup> However, we do know that the percentage of enrolled students who were minority students in degree-granting institutions increased from fall 2010 to fall 2013, after the regulations became effective: minority enrollment as a percentage of all enrollment increased from 39.5 percent in 2010 to 43.1 percent in 2013.<sup>5</sup> Similarly, minority student

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<sup>4</sup> Although the percentage of revenue spent by for-profit institutions on advertising and recruiting, the numbers of recruiters, and the abusive recruiting tactics used by for-profit schools have been reported in, e.g., the HELP committee report, that report simply states variously that "some companies" or "many companies" used the practice. Id., at 3, 4, 50, 51. A commenter asserted that incentive compensation payments are "widespread" (AR 3308).

<sup>5</sup> National Center for Education Statistics (NCES) (2014) Digest of Education Statistics (Table 306.50) available at [http://nces.ed.gov/programs/digest/d14/tables/dt14\\_306.50.asp](http://nces.ed.gov/programs/digest/d14/tables/dt14_306.50.asp), and NCES (2011) Digest of Education Statistics (Table 241), available at [http://nces.ed.gov/programs/digest/d11/tables/dt11\\_241.asp](http://nces.ed.gov/programs/digest/d11/tables/dt11_241.asp). The numbers of students are those identified as the "fall enrollment" students, from the Integrated Postsecondary Education Data System (IPEDS) maintained by the National Center for Education Statistics and derived from periodic reports from postsecondary institutions. The fall enrollment is the annual component of IPEDS that collects data on the number of students enrolled in the fall at postsecondary institutions. Students reported are those enrolled in courses creditable toward a degree or other formal award; students enrolled in courses that are part of a vocational or occupational program, including those enrolled in off-campus or extension centers; and high school students taking regular college courses for credit. Institutions report annually the number of full - and part-time students, by gender, race/ethnicity, and

enrollment as a percentage of total enrollments in for-profit degree-granting institutions increased from fall 2010 to fall 2013: from 49.3 percent (4-year institutions) and 56 percent (2-year institutions) in 2010 to 54 percent (4-year institutions) and 61 percent (2-year institutions) in 2013.<sup>6</sup> These changes may be the result of many factors that are difficult to weigh or distinguish with respect to their effects on enrollment, including that institutions have already made changes needed to recruit in a manner compliant with the ban. However, these data do not support a claim that the incentive compensation ban has in fact negatively affected minority enrollment.

The Department continues to support all lawful efforts to promote diversity in enrollment, and nothing in the amended regulations changes that fact. Schools can implement effective recruiting programs generally, and effective minority outreach programs specifically, without

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level (undergraduate, graduate, first-professional); the total number of undergraduate entering students (first-time, full-and part-time students, transfer-ins, and non-degree students); and retention rates. In even-numbered years, data are collected for State of residence of first-time students and for the number of those students who graduated from high school or received high school equivalent certificates in the past 12 months. Also in even-numbered years, 4-year institutions are required to provide enrollment data by gender, race/ethnicity, and level for selected fields of study. In odd-numbered years, data are collected for enrollment by age category by student level and gender. <http://nces.ed.gov/ipeds/glossary/?charindex=F>

<sup>6</sup>Id. Some of the data cited here post-dates the promulgation of the final regulations, but the Department is including such data for illustrative purposes.



compensating recruiters based on the number of students enrolled. Considerable efforts have already been made by this and other agencies, and non-governmental entities, to explore techniques to reach minority students and persuade them that postsecondary education is both available to them and worth their investment.<sup>7</sup> It is beyond the scope of this clarification and additional information to incorporate that literature or summarize the findings. The commenters did not seek Department guidance on how to conduct outreach to minority students, and any institution interested in methods of such outreach can access resources and information on methods of outreach through Department and other sources.<sup>8</sup> The commenters directly asked only for guidance about how to apply the compensation ban to minority recruitment practices, and we respond simply that the ban prohibits compensating those performing outreach and recruitment activities for minority students on the basis of the number of students enrolled. As we note above, minority students are often the target of

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<sup>7</sup> In addition, as one commenter notes, Title IV of the Higher Education Act authorizes the Trio Grant Programs to finance activities to encourage "qualified individuals from disadvantaged backgrounds" to prepare for and enroll in postsecondary education, and that for-profit institutions qualify for grants under these programs. 20 U.S.C. 1070a-11 *et seq.*

<sup>8</sup> See, e.g., list of resources on minority student outreach available through the Department's website: <http://findit.ed.gov/search?utf8=%E2%9C%93&affiliate=ed.gov&query=minority+outreach+>

recruitment practices that lead to enrollment in courses of study that do not further their educational or vocational goals and are contrary to their economic interests, and the rule is intended to reduce that occurrence.

We acknowledge that some institutions may need to revise their diversity outreach operations if they depend more on the financial motivation of the recruiter than the design of the recruiting or outreach plan or the relative value of the programs touted by the recruiter. The regulations address only the payment of incentives to recruiters, not the activities the school requires recruiters to perform. Thus, the regulations do not prevent an institution from holding a recruiter accountable for implementing an effective recruiting or minority outreach plan adopted by the institution.

In sum, the Department acknowledges that the amended regulations may result in some negative impact on minority recruitment and enrollment. But neither the statute nor any information presented by the commenters or in the administrative record provides a basis for treating a recruitment program directed at minority students differently than an institution's general or other specific recruitment programs.

#### List of Subjects

#### 34 CFR Part 600

Colleges and universities, Foreign relations, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

#### 34 CFR Part 602

Colleges and universities, Reporting and recordkeeping requirements.

#### 34 CFR Part 603

Colleges and universities, Vocational education.

#### 34 CFR Part 668

Administrative practice and procedure, Aliens, Colleges and universities, Consumer protection, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

#### 34 CFR Part 682

Administrative practice and procedure, Colleges and universities, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

#### 34 CFR Part 685

Administrative practice and procedure, Colleges and universities, Loan programs-education, Reporting and

recordkeeping requirements, Student aid, Vocational education.

34 CFR Part 686

Administrative practice and procedure, Colleges and universities, Education, Elementary and secondary education, Grant programs-education, Reporting and recordkeeping requirements, Student aid.

34 CFR Part 690

Colleges and universities, Education of disadvantaged, Grant programs-education, Reporting and recordkeeping requirements, Student aid.

34 CFR Part 691

Colleges and universities, Elementary and secondary education, Grant programs-education, Student aid.

Dated: November 23, 2015

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Arne Duncan,  
Secretary of Education.

[FR Doc. 2015-30158 Filed: 11/25/2015 8:45 am; Publication Date: 11/27/2015]